Supreme Court, U.S.
FILED
OCT 31 2008
OFFICE OF THE CLERK

No. 08-223

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MCWANE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents do not dispute the central submissions supporting the government's petition for certiorari: The circuits are in conflict on the rule of law established by *Rapanos* v. *United States*, 547 U.S. 715 (2006). That conflict reflects a disagreement on how to discern the controlling principles of fractured decisions of this Court. And the confusion in the circuits—especially the Eleventh Circuit's holding that the Clean Water Act (CWA) does not necessarily cover waters satisfying a standard endorsed by eight Members of this Court in *Rapanos*—creates serious problems for effective CWA enforcement.

Respondents seek to shift the focus from those significant legal issues to a case-specific argument against CWA coverage here, based on a misunderstanding of both the *Rapanos* plurality's opinion and the record in this case. Respondents also downplay the significance

of the conflict and request that the Court defer its resolution until the government provides regulatory guidance, even though the conflict itself precludes an effective and nationally uniform regulatory program. Respondents' arguments against review lack merit. This Court's intervention to identify the controlling legal rule in *Rapanos* is urgently needed, as confirmed by the numerous industry amici supporting the petition.

A. The Decision Below Creates An Acknowledged Circuit Conflict That Warrants Immediate Review

1. Respondents concede (Opp. 11) that the circuits disagree on the rule of law that emerged from *Rapanos*. As the court below expressly recognized (Pet. App. 20a-23a), its holding that CWA coverage may be established under *only* Justice Kennedy's "significant nexus" standard directly conflicts with *United States* v. *Johnson*, 467 F.3d 56, 64 (1st Cir. 2006), cert. denied, 128 S. Ct. 375 (2007), which held that coverage may be established under *either* Justice Kennedy's standard *or* the *Rapanos* plurality's standard.

Contrary to respondents' contention (Opp. 28-29), this Court's review of the conflict is warranted now. The issue is recurring and has already been addressed by four circuits in the two years since *Rapanos*. Pet. 16-19. Because the issue hinges entirely on this Court's interpretation of its own decision, further percolation in the lower courts is unlikely to provide assistance. And postponing review would exacerbate the serious problems that the conflict is already creating—uncertainty about thousands of CWA coverage determinations made under the *Rapanos* plurality's standard; significant resource burdens on both the government and the regulated community because of the complexity in applying the "sig-

nificant nexus" standard; and an unacceptable regional disarray in the conduct prohibited by federal criminal law. Pet. 28-31.[1]

2. Respondents also do not dispute that the conflict on the meaning of *Rapanos* reflects an additional disagreement among the circuits on how to apply *Marks* v. *United States*, 430 U.S. 188 (1977), and to discern the controlling principles of fractured decisions of this Court. As amicus Pacific Legal Foundation explains (Br. 4-15), that issue itself deserves this Court's review. Respondents make no effort to explain why the conflict over *Marks* does not merit review.

Instead, respondents insist that the only "relevant question" is the test governing CWA coverage and that "a majority of this Court is no more likely to agree on a test today" than when it decided *Rapanos*. Opp. 29. On the contrary, a majority of the Court may well agree on the standard governing CWA coverage in this case, which arises in a very different context than *Rapanos*. Unlike *Rapanos*, which involved landowners placing fill into wetlands on their property, this case involves respondents discharging thousands of gallons of polluted wastewater into a perennial stream that feeds, in a continuous flow, into traditional navigable waters. Pet. 6-9.

In any event, certiorari is warranted to resolve the distinct question of what controlling rule of law was established by *Rapanos* in light of the principles govern-

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[1] Although respondents argue (Opp. 28-29) that the First Circuit might eliminate the conflict by granting en banc review, that is highly unlikely because the First Circuit denied en banc review in *Johnson* itself. Respondents also erroneously contend (Opp. 29) that the government's opposition to review in *Johnson* shows the issue's unimportance. The circuit conflict did not exist then; it was created by the decision below. Pet. 16-19.

ing interpretation of fractured decisions. Resolving that question would not necessarily require the Court to bridge the gap that could not be crossed in *Rapanos*. But it would be of enormous benefit to both the government and the regulated community.

B. This Case Is An Appropriate Vehicle To Resolve The Conflict

Respondents primarily claim (Opp. 12-26) that this case is not an appropriate vehicle to resolve the circuit conflict because, in their view, the government would not prevail even under the *Rapanos* plurality's standard. That contention is flawed on multiple levels.

1. First, respondents' contention is contrary to the very decision they purport to defend. The court below determined that the district court's instructional error "may well have been harmless" under the plurality's standard. Pet. App. 29a. For that reason, the court concluded, "the decision as to which *Rapanos* test applies may be outcome-determinative in this case." *Ibid.* That conclusion is fatal to respondents' position. Because the question presented "may be outcome-determinative," certiorari is warranted to resolve it, even if this Court, after ruling for the government, chooses to remand for application of the correct standard by the court below.

2. Respondents' vehicle argument is also flawed because it rests on a fundamental mischaracterization of the plurality's standard. Respondents assert that, under the plurality's opinion, a tributary qualifies as a "water[] of the United States," 33 U.S.C. 1362(7), only if it is "physically proximate" (Opp. 16) to traditional navigable waters. That is incorrect. According to the plurality, "a relatively permanent body of water *connected to* traditional interstate navigable waters" is a "water[] of the

United States." 547 U.S. at 742 (emphasis added). That standard is satisfied whenever a tributary with relatively permanent flow feeds, through like-waters, directly or indirectly into traditional navigable waters. Adjacency, or some nebulous degree of "proximity," is not required.

The plurality indicated that "waters of the United States" include "relatively permanent, standing or continuously flowing bodies of water, 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" 547 U.S. at 739. Thus, under the plurality's standard, covered waters do not include "channels containing merely intermittent or ephemeral flow." *Id.* at 733-734. But the plurality nowhere suggested that relatively permanent tributaries are "waters of the United States" only if they satisfy an additional requirement of "physical proximity" to traditional navigable waters. On the contrary, the plurality stated that "channels containing permanent flow are plainly within the definition." *Id.* at 733 n.5.

Indeed, a "proximity" requirement is inconsistent with the plurality's remand instructions. The plurality instructed the lower courts to determine "whether the ditches or drains" at issue were "'waters' in the ordinary sense of containing a relatively permanent flow." 547 U.S. at 757. The plurality did *not* instruct those courts to determine whether the ditches or drains were "physically proximate" to traditional navigable waters, even though, earlier in its opinion, the plurality noted that the nearest navigable water was 11 to 20 miles from one of the discharge sites. *Id.* at 720.

Respondents contend that a "proximity" requirement for tributaries is supported by the "plurality's repeated references to 'adjacency.'" Opp. 16. But the plurality

referred to adjacency only in discussing when *wetlands* are covered under the CWA because they are "adjacent to" other "waters of the United States." 547 U.S. at 742, 748, 755 (cited at Opp. 15). The plurality did not mention adjacency in discussing when *tributaries* are covered because they are themselves "waters of the United States." *Id.* at 730-739.

Likewise, respondents mistakenly rely (Opp. 13) on the plurality's statement that "relatively continuous flow is a *necessary* condition for qualification as a 'water,' not an a*dequate* condition." 547 U.S. at 736 n.7. The plurality made that statement in explaining that "elaborate, manmade, enclosed systems"—such as sewage treatment plants and municipal waterworks—"likely do not qualify as 'waters of the United States,' despite the fact that they may contain continuous flows of water." *Ibid.* That conclusion provides no support for a "proximity" requirement.

Nor is a "proximity" requirement supported by the plurality's statement that "the lower courts do not generally rely on characterization of intervening channels as 'waters of the United States' in applying" the CWA's prohibition of unauthorized discharges. 547 U.S. at 745 (quoted at Opp. 14). The plurality made that statement in arguing that excluding "*intermittent* channels as 'waters of the United States'" would not impair CWA enforcement because "discharge[s] into *intermittent* channels" would still be proscribed if pollutants reached "covered waters." *Id.* at 743 (emphasis added). The plurality's statement in no way contradicts its earlier recognition that *relatively permanent* channels *are* "covered waters" if they connect (directly or indirectly) to traditional navigable waters.

Respondents also erroneously contend (Opp. 16-18) that a "proximity" requirement is supported by the plurality's criticisms of decisions like *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004). The plurality did not criticize those decisions for covering tributaries that were too "remote." Opp. 16. It criticized them for covering tributaries that were only "ephemeral channels and drains." 547 U.S. at 726. Nothing in the opinion indicates that the plurality adopted a "proximity" requirement for tributary coverage under the CWA.[2]

3. Under the plurality's standard properly understood, the trial evidence overwhelmingly established that Avondale Creek, the stream into which respondents routinely dumped contaminant-laden wastewater, is a covered water. As the petition explains (at 8-10), abundant, uncontroverted evidence established that Avondale Creek flows year-round and feeds, in an uninterrupted flow, into traditional navigable waters.[3]

Respondents suggest that Avondale Creek is not a covered water because the government did not prove its "natural origin" (Opp. 24) and parts of it have been "channelized and straightened" (Opp. 9). Even if a showing of "natural origin" were required, the uncontroverted evidence established that Avondale Creek, which has a four-square-mile watershed, has been a hydro-

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[2] Respondents suggest (Opp. 17) that the plurality adopted the holding of *In re Needham*, 354 F.3d 340 (5th Cir. 2003). The plurality did not cite that decision, much less adopt its holding.

[3] Respondents' assertion (Opp. 24-26) that they lacked incentive to present evidence that Avondale Creek flows only intermittently is beside the point. Their own evidence conclusively proved the creek's continuous flow by establishing that numerous fish live there year-round. Pet. 10 n.5.

graphic feature for more than 100 years. Tr. 4402-4403, 4096-4097. Moreover, nothing in the plurality's opinion suggests that partial channelization or straightening disqualifies a water from CWA coverage. Most major rivers (including the Chicago, Columbia, and Mississippi) have channelized segments.[4]

Likewise, the record does not support respondents' claim (Opp. 19-20) that the government failed to prove that Avondale Creek feeds into *interstate* traditional navigable waters. The jury found that Avondale Creek flows into water "used or * * * susceptible of being used in its ordinary condition, as a highway for *interstate* commerce." Pet. App. 11a-12a (emphasis added). That definition of "navigable water of the United States" from *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), was recognized by the *Rapanos* plurality, 547 U.S. 730-731 & n.3.

Ample evidence supported the jury's finding. The evidence established that Avondale Creek flows into Village Creek, which feeds into the Locust Fork River and then the Black Warrior River. Tr. 2229-2231. Respondents never challenged the status of the Black Warrior River as a traditional navigable water at trial, and they conceded that status on appeal. Tr. 2235; Devine C.A. Br. 22-24; Delk C.A. Br. 17-20; McWane C.A. Br. 13-14; Devine C.A. Reply Br. 14; Delk C.A. Reply Br. 3-4; McWane C.A. Reply Br. 5. Respondents now argue

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[4] Respondents also incorrectly imply (Opp. 17, 20) that the existence of a dam on Village Creek, the tributary into which Avondale Creek flows, cuts against CWA coverage. Such improvements neither defeat navigability, *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940), nor preclude CWA coverage. Many major rivers (including the Colorado, Columbia, Mississippi, and Ohio) have dams spanning their widths.

(Opp. 19-20 n.7) that the Black Warrior River is not an *interstate* traditional navigable water because it is located entirely in Alabama. Whether the Black Warrior River crosses state borders is irrelevant, however, because it feeds through other navigable rivers into the Gulf of Mexico.[5]

Respondents repeatedly argue that Avondale Creek is "more than forty-five miles" from the nearest traditional navigable waters (Opp. 3, 9, 20) as if distance held a talismanic significance under the CWA. It does not. Such a rule would illogically expose traditional navigable waters to damage from pollutants solely because a polluter happened to dump toxins into a distant upstream tributary. In any event, Village Creek is a traditional navigable water in its final 1.3 miles, as the evidence established. Pet. 8-9 & n.4; GX 177; Tr. 2236-2237.

Respondents contend (Opp. 20-23) that the government cannot argue in this Court that Village Creek is a traditional navigable water because the government did not make that argument below. On the contrary, the government has consistently asserted that Village Creek is a traditional navigable water. See Gov't Consolidated Resp. to Defs'. Mot. 23 n.11; Gov't C.A. Br. 38-40. In any event, that is a matter that should be addressed on remand, if this Court clarifies that the *Rapanos* plurality's standard suffices to establish CWA coverage.

Finally, respondents mistakenly argue that, despite the overwhelming evidence that Avondale Creek is a covered water under the plurality's standard, their convictions must be reversed because "the jury did not have *the opportunity to find*" that the creek flows continu-

[5] The Black Warrior River flows into the Tombigbee River, which flows, via the Mobile River, into the Gulf of Mexico. See http://www.outdooralabama.com/fishing/freshwater/where/ rivers/rivers.cfm.

ously. Opp. 24. That argument is inconsistent with *Neder* v. *United States*, 527 U.S. 1 (1999), which held that, when a jury instruction omits or misdescribes an offense element, the error is harmless if a rational jury would have had to find that element based on the evidence. And the Eleventh Circuit acknowledged that, if the plurality's standard applies, any instructional error may well have been harmless. Pet. App. 29a.

C. The Decision Below Is Incorrect

As the petition explains (at 19-28), the court below erroneously held that Justice Kennedy's standard provides the controlling rule of law under *Rapanos*, even when it excludes from CWA coverage waters that would be covered under the standards adopted by eight Members of this Court.

Respondents' only defense of that holding is their argument (Opp. 26-27) that, under *Marks*, dissenting opinions can never be consulted to ascertain the rule of law established by a fractured decision. But that argument cannot be squared with numerous decisions of this Court that have considered dissenting opinions for that purpose. See Pet. 24-25 (citing cases). Those decisions establish not only that *this Court* may consider dissenting views, *e.g.*, *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1045 (2008), but that *lower courts* also may do so, *e.g.*, *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr.*, 460 U.S. 1, 17 (1983) (holding that "Court of Appeals correctly recognized that the four dissenting Justices and Justice Blackmun formed a majority to require application of the *Colorado River* test"). Tellingly, respondents do not even try to defend the court of appeals' conclusion that Justice Kennedy's opinion is controlling, much less to justify the "bizarre outcome" that the court's con-

clusion produces—a ruling that CWA coverage of waters is not established, even though eight Members of this Court would find coverage. *Johnson*, 467 F.3d at 64.

D. The Question Presented Is Important

Respondents argue (Opp. 29-30) that review of the question presented is not important because the choice between Justice Kennedy's and the plurality's standard will affect the outcome of only a handful of cases. But, as the petition explains (at 28-32), whether or not the choice of standard proves outcome-determinative in a large number of cases, the erroneous decision below and the resulting conflict significantly impede effective enforcement of the CWA and burden both the government and the regulated public. The numerous amicus briefs supporting the petition, filed on behalf of broad segments of the business community and the affected public, confirm the importance of this Court's review.

The decision below may call into question thousands of CWA coverage determinations in the Eleventh Circuit. Pet. 29-30. Thousands of coverage determinations have been made under the plurality's standard in other circuits as well, and those determinations will also be subject to challenge (except in the First Circuit) unless this Court grants review and reverses the ruling below. In addition, ascertaining CWA coverage under the "significant nexus" standard requires substantially more time and expense for both the government and the regulated community. Pet. 28-30. And, because CWA violations can trigger criminal penalties, the conflict over CWA coverage means that conduct that is legal in one jurisdiction may be prosecuted in another. Pet. 31.

Respondents do not dispute that the decision below has "significant practical ramifications." Opp. 31. But

respondents argue that the Court should nonetheless deny review because, they assert, the government could eliminate the problems by promulgating regulations. That is not correct.

The government cannot by regulation resolve whether, under *Rapanos* and the Court's jurisprudence on fractured decisions, the plurality standard has any legal force. If the government promulgated a rule allowing CWA coverage to be established under either standard, the regulation would be invalid *ab initio* in the Eleventh Circuit and subject to challenge in numerous other jurisdictions. Further direction from this Court is thus essential to resolve the uncertainty over the scope of the CWA. Moreover, this Court customarily resolves circuit conflicts on important questions of federal law—especially when they turn on the meaning of the Court's own decisions—rather than permitting those conflicts to persist and requiring the Executive or Congress to work around erroneous constructions of federal law.

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For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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OCTOBER 2008